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The opinions expressed herein do not necessarily reflect the views of The Judge Advocate General or the Army.

Editor's Note

The U.S. Army Engineer Division, Huntsville, will be sponsoring an Ordnance and Explosives workshop in Las Vegas, Nevada, from 27 to 30 January 1997. The workshop discusses removal response actions for conventional unexploded ordnance (UXO). Although the course addresses UXO response actions at Formerly Used Defense Sites (FUDS), the removal response action process used at FUDS is very similar to that currently being used by the Army at other locations. For those of you at installations that are conducting or planning to conduct UXO removals, the course is an opportunity to become familiar with basic procedures and requirements followed in UXO response actions.

The point of contact for information about the course and registration is Mr. Doug Wilson, Huntsville Division, commercial telephone (205) 895-1533, or facsimile (205) 895-1513. There is no tuition charge for the course; however, participants are responsible for their travel and per diem expenses.

NEPA and Hunting Revisited - Mr. Kohns

Early this year, a Federal district court judge in New Mexico barred a state-sponsored hunt of state-owned buffalo on Fort Wingate because the Army had not performed any National Environmental Policy Act (NEPA) analysis. The judge ruled that the Army's ability to place safety and security-related conditions on the hunt was sufficient control to make the hunt a "Federal action" pursuant to NEPA. *Environmental Law Division (ELD) Bulletin*, Vol. 3, No. 6, pages 1-2, March 1996, citing The Fund for Animals, et al., v. United States, NO. 6:96-CV-40 MV/DJS (D.N.M. 1996).

The Engle Act requires the Army to comply with state hunting, fishing, and trapping regulations. The statute also requires the Army to provide state officials with full access to its installation to carry out these regulations, conditioned only by safety and military security measures. Engle Act, 10 U.S.C. §2671, et seq. (1958).

New Mexico notified the Army commander at Fort Wingate of the hunt and requested access. The commander granted access subject to four conditions: The hunters were to be accompanied by a New Mexico Game and Fish employee; hold the U.S. harmless for any harm suffered by hunters on the hunt; observe Army-specified off-limits areas designated to protect Federal interests (open burn pits containing unexploded ordnance, historical ruins, etc.); and, not bring flame producing devices or alcohol onto Fort Wingate. No Federal funds were to be used to perform the hunt itself. Federal funds were used solely to provide access to Fort Wingate.

Shortly after the ruling, the Army asked the judge to reconsider her opinion because the 1966 plan establishing the herd pre-dated NEPA. In October, 1996, the court rejected this

argument, holding that the plan's failure to specify all of the hunt's "parameters" and the Army's ability to control the hunt in accordance with extant law made the current hunt an "ongoing project" subject to NEPA.

The denial of the motion for reconsideration enables the Army to appeal to the Tenth Circuit Court of Appeals. The Environmental Law Division (ELD) is currently coordinating with the U.S. Department of Justice to seek appeal of the rulings. Appeal is being sought because hunting and fishing occurs at many Army installations under the auspices and management of state fish and game officials. The Army contends that Fund for Animals should be overturned because no NEPA analysis is necessary where the Army lacks discretion to act. This is true particularly where the state promulgates a hunting or fishing regulation that we are required by law to follow. As a practical measure, however, Army installations should include the guidelines for hunting and fishing programs in their installation's Integrated Natural Resources Management Plan (INRMP). All INRMPs must undergo NEPA analysis in accordance with DEP'T OF ARMY REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1989).

The deadline for filing a notice of appeal is 19 December 1996. Once filed, the court will establish a briefing schedule and determine the need for oral argument. No decision on this appeal is expected for many months. In the interim, installations should continue to assess the impact of state hunting and fishing regulations as part of the installation's implementation of the INRMP.

DID YOU KNOW? . . . IN 1273, KING EDWARD I BANNED THE BURNING
OF COAL IN LONDON IN AN ATTEMPT TO REDUCE AIR POLLUTION.

Environmental Compliance Assessment System - Mr. Nixon and MAJ Ayres

Army Regulation 200-1 requires each installation to establish and maintain an Environmental Quality Control Committee (EQCC). DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, PARA. 12-13, (23 APR. 1990) [HEREINAFTER AR 200-1]. The EQCC acts on a broad range of installation environmental issues, priorities, policies, and strategies. The EQCC also plays a key role in conducting internal Environmental Compliance Assessment System (ECAS) assessments and preparing for external ECASs. The installation Environmental Law Specialist (ELS) is an integral member of the EQCC, which is also comprised of members representing the command, operations, engineering, resource management, safety, medical, and tenant activities. Overseas, the EQCC is often referred to as the Environmental Protection Committee (EPC) because this is the term used in the Overseas Environmental Baseline Guidance Document (OEBGD).

One of the responsibilities of the EQCC is to establish an internal ECAS that, at a minimum, conducts an internal ECAS each year that an external ECAS is not completed. External ECASs are conducted every three years.

External ECASs are coordinated and planned by the Army Environmental Center (USAEC). The external ECAS is normally conducted by a team of 12 to 20 technical experts and typically lasts at least one week. The Team conducts an in-brief and out-brief for the installation command and staff. The Team Leader also conducts a daily brief with the installation Environmental Management Officer (EMO) to discuss the ECAS Team's daily findings and recommendations. We recommend that the installation ELS attend as many of these briefings as possible. The schedule of upcoming external ECASs for this fiscal year is as follows:

FORSCOM: Ft. Campbell, KY - 24 Feb to 14 Mar 97; Fort Buchanan, PR - 28 Apr to 16 May 97; Ft. Indiantown Gap, PA - 2 to 20 Jun 97; Ft. Bragg, NC - 11 to 29 Aug 97.

TRADOC: Ft. Gordon, GA - 6 to 24 Jan 97; Ft. Knox, KY - 10 to 28 Mar 97; Ft. Lee, VA - 12 to 30 May 97; Ft. Leavenworth, KS - 21 Jul to 8 Aug 97.

USARPAC: 17th ASG, Japan - to be determined.

MEDCOM: Ft. Sam Houston, TX - 2 to 20 Dec 96.

MTMC: Bayonne MOT, NJ - 7 to 18 Apr 97; Oakland Army Base, CA - 8 to 19 Sep 97.

U.S. Environmental Protection Agency Focuses upon Endangered Species - MAJ Ayres

Installations should be aware of the interface between the U.S. Environmental Protection Agency's (USEPA) traditional regulatory role and a new focus upon endangered species and other ecological resources. On September 9, 1996, USEPA proposed guidelines for Ecological Risk Assessments. USEPA's Proposed Guidelines for Ecological Risk Assessments, 61 Fed. Reg. 47,552 (Sept. 9, 1996). Concurrent with this measure, in practice, it appears that USEPA increasingly desires a more detailed ecological risk assessment (ERA) for projects that require health risk assessments as part of a regulatory permitting process. In the event an installation prepares an ERA, and if Federally listed threatened and endangered species are present in the area of potential effects, installations should supplement their Endangered Species Act (ESA), Section 7 consultation with results of the ERA. ESA, 16 U.S.C. §1536 (1988).

Additionally, according to one publication, USEPA is planning to elevate its concern and actions in furtherance of the protection of endangered species. *Inside EPA's Environmental Policy Alert*, Vol.XIII, No. 23 (November 6, 1996), p. 40. The publication notes that the USEPA is already consulting with the Department of Interior to determine if USEPA's water quality standards need to be revised to be more protective of endangered species. Id. The article also notes that USEPA's "pesticide office is debating how to resurrect its endangered species program." Id. The article quotes a USEPA source as stating: "EPA knows it has to strengthen its [ESA] programs, . . . We've waited for political endorsement which we recently got." Id.

DID YOU KNOW? . . . EVERGREENS, BECAUSE OF THEIR LONG LIFE SPAN AND THEIR NEEDLES' YEAR ROUND EXPOSURE TO THE ELEMENTS, ARE THE TREES THAT ARE MOST VULNERABLE TO AIR POLLUTION.

Settlement Reached on Phase IV Land Disposal Restriction Rule - MAJ Anderson-Lloyd

On 31 October 1996, the U.S. Environmental Protection Agency (USEPA) and the Environmental Defense Fund (EDF) reached an agreement concerning promulgation of the Land Disposal Restrictions Phase IV rulemaking. The LDR IV rule was proposed in August 1995 and was scheduled to be finalized in the summer of 1996 pursuant to a consent decree with EDF. Widespread opposition to the rule caused USEPA to negotiate an extension on the finalization of the rule.

The agreement, filed in U.S. District Court for the District of Columbia, set 15 April 1997 as the deadline for the final rule establishing treatment standards for wood preserving wastes. The other portions of the Phase IV rule dealing with mineral processing waste recycling and land disposal restrictions for metal wastes will be repropose in April 1997 with finalization set for April 1998.

The "mini" Phase IV rule to be finalized April 1997 will be a pared down version of the original rule. Congress' RCRA rifle shot bill, signed by the President in March 1996, allowed the agency to remove many of the proposed treatment standards from both the Phase III and Phase IV

rules. USEPA had been under a court order (*Chemical Waste Management v. EPA*, 976 F.2d 2 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1961 (1993)) to promulgate RCRA treatment standards for decharacterized wastes even if they were regulated by other statutes, such as Clean Water Act and the Safe Drinking Water Act.

USEPA's repropoed rule shifts from allowing recycling in land units to requiring the use of storage tanks and containers. USEPA cites "new information" as its reason for the change in the repropoal's basic premise. Although environmentalists will undoubtedly support the repropoal as an improvement, there will be close scrutiny of USEPA's justification for the change.

DID YOU KNOW? . . . 85 SPECIES OF BIRDS NEST IN TREE CAVITIES IN THE FORESTS OF NORTH AMERICA.

U.S. Environmental Protection Agency Considers Options on Recycling Rulemaking - CPT Anders

On 19 November 1996, the U.S. Environmental Protection Agency (USEPA) convened a public meeting in Washington, D.C., to discuss its upcoming proposal to amend the definitions of solid waste at 42 U.S.C. §6903(27) and 40 C.F.R. §261.2. These provisions govern the Resource Conservation and Recovery Act (RCRA) subtitle C jurisdiction over hazardous secondary materials that are under a legitimate recycling process. "Legitimate" recycling are those processes where the secondary material: (1) significantly contributes to the product or the process; (2) can be sold in commerce as a result of the recycling process; (3) is managed to minimize losses; and, (4) no significant increases in the levels of toxic constituents can result. Although USEPA's proposed amendments are in the drafting stage, the purpose of the public meeting was to place the regulated community on notice of the Agency's probable approach to revamp RCRA's recycling regulations that have been in effect since 1985. The proposed amendments will advance two options for comment.

The first is the "Transfer-Based" option, which would allow a RCRA exemption for secondary materials that are recycled on site of generation or within the same "company." Materials shipped off-site or outside of the company, even for legitimate recycling processes, would be considered a waste subject to full subtitle C regulation. The current scheme for granting case-specific variances for certain materials at 40 C.F.R. §260.31 would be retained in principle. There would be several conditions to qualify for the exemption (i.e., no land disposal, inventory recordkeeping requirements, no speculative accumulation), and certain types of recycling would be regulated even if performed on-site (i.e., burned for energy recovery, use constituting disposal, or designated inherently waste-like). The option would also exclude waste fuels comparable to petroleum fuels.

The second option is the "In-Commerce" option, which treats recycling as an on-going production. Under the In-Commerce option, the major jurisdictional determinant is how the secondary material is being recycled, excluding from subtitle C regulation the recycling of any secondary material that is handled like a commodity and is used to produce a marketable product. This option focuses on the commercial value of the secondary material, rather than on where the recycling process takes place. As with the first option, the material would be regulated if burned for energy recovery, disposed of, speculatively accumulated, stored on land, or designated inherently waste-like.

Once USEPA formally proposes its amended definitions, DA will solicit comments from installation and MACOM legal and environmental offices on which option, or combination of the options, would be of greatest utility.